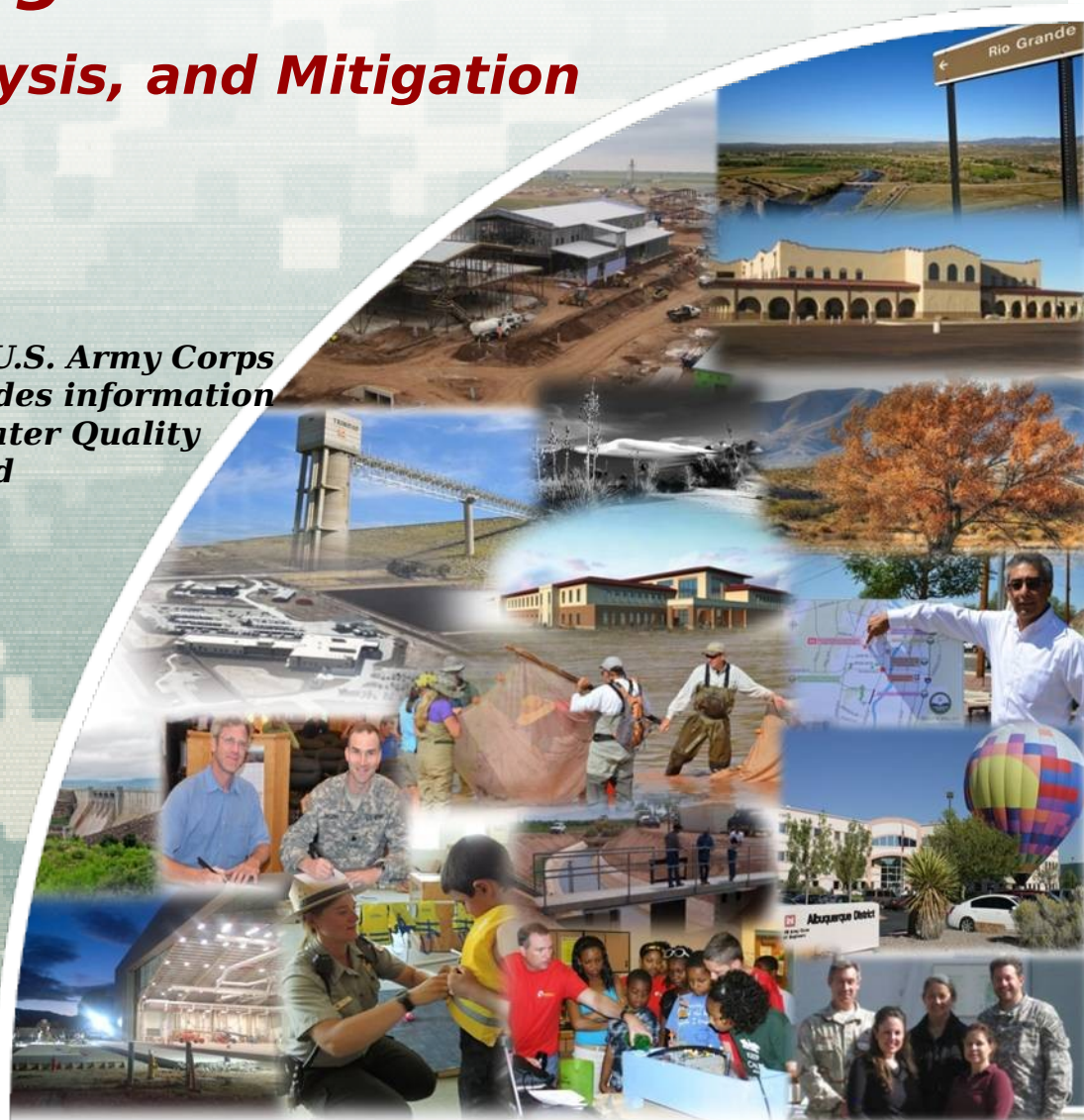
U.S. ARMY CORPS OF ENGINEERS

The Regulatory Program

Jurisdiction, Permits, Analysis, and Mitigation

Albuquerque District

This presentation is an introduction to the U.S. Army Corps of Engineers Regulatory Program and includes information specific to the Albuquerque District (e.g. Water Quality Certifications, Regional General Permits and District-specific Letters of Permission).



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Regulatory Program

Mission

To protect the Nation's aquatic resources, while allowing reasonable development through fair, flexible and balanced permit decisions.

Goals

- To provide strong protection of the Nation's aquatic environment, including wetlands.
- To enhance the efficiency of the Corps' administration of its regulatory program.
- To ensure that the Corps provides the regulated public with fair and reasonable decisions.

Presentation Outline

1. Jurisdiction (Waters of the U.S.)
2. Non-Regulated Activities and Exemptions
3. Permits
   - General (Nationwide and Regional General Permits)
   - Individual (Public Review/Alternatives Analysis/EA)
5. Water Quality Certification
6. Mitigation and Monitoring
7. Agency Coordination
8. Questions

Waters of the U.S. (WoUS)

1. Waters currently used, used in past, or susceptible for use in interstate or foreign commerce, including waters subject to ebb and flow of the tide
2. Interstate waters and wetlands
3. Intrastate waters where destruction or degradation could affect interstate or foreign commerce (HQ approval required)
   - ► Waters used for recreation or other purposes
   - ► Waters with fish or shellfish sold in interstate or foreign commerce
   - ► Waters used for industrial purposes
4. Impoundments of waters of the U.S.
5. Tributaries to waters in categories 1 – 4
6. Territorial seas (3 miles from shore)
7. Wetlands adjacent to waters of the U.S.

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Jurisdictional Determinations (JDs)

Two Types of JDs:

Preliminary: Written indications that there may be Waters of the U.S. present. Preliminary JDs are "advisory" in nature and are not appealable. The preliminary JD process facilitates quick issuance of general permits.

Approved: The Corps documents whether or not a Water of the U.S. is present. Approved JDs are appealable actions. The approval process may be time consuming, and in many cases requires EPA approval.

Ordinary High Water Mark (OHWM)

Definition in 33 CFR 328.3 (e):

"…that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas."

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OHWM

- Does NOT mean:
  - Thalweg
  - 1.2 to 2-year flow event limits as determined by hydrologic analysis
  - Bankfull (as defined for frequent seasonal to perennial stream systems)
  - Low-flow channel
  - Erosional feature
- Must be determined site-by-site with physical characteristics at the site

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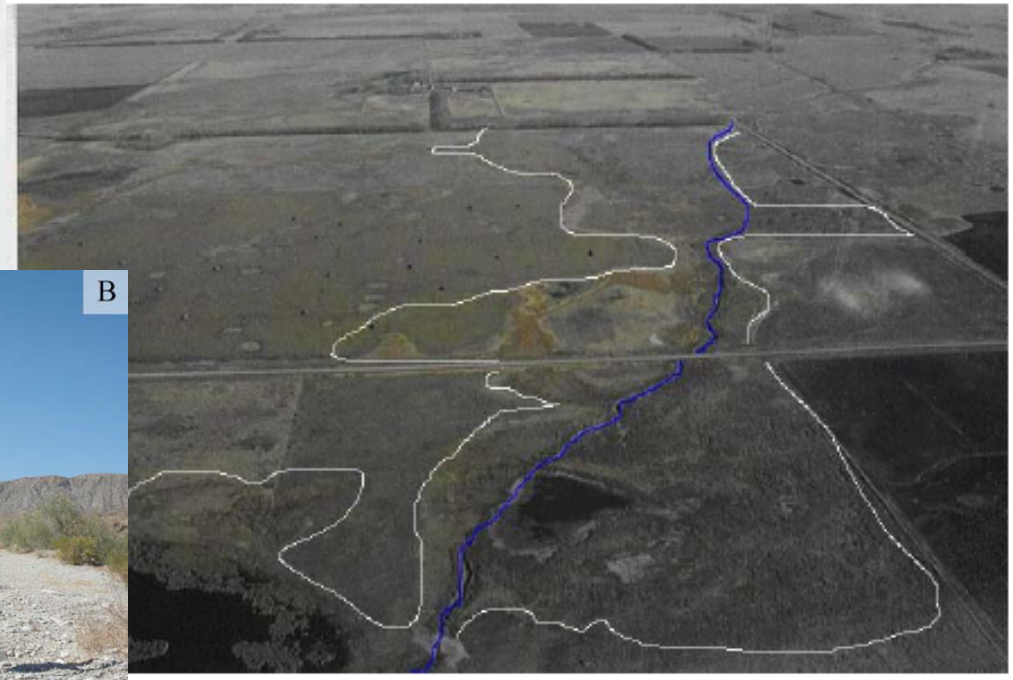
OHWM

Photo 15. Loosahatchie River, Somerville, TN. Flow is perennial.

Photo 29. Ephemeral tributary, a concrete flood control channel, Santa Barbara, CA.

Photo 33. Wetland is directly abutting an RPW, ND. Blue line represents the channel; white lines mark approximate location of boundaries between wetlands and uplands.



Activities Not Regulated Under Sec. 404

"Pure Excavation" - Activities where incidental fallback of excavated materials is the only discharge is not regulated as a discharge of dredged material, pursuant to Section 404 of the Clean Water Act (33 CFR 323.2(d)).

Pilings/Posts – Driving piles/posts into the ground with enough spacing between them so that there is no effect of a discharge of dredged or fill material.

Floating structures – Placing floating structures on waters of the U.S. so that there is no effect of a discharge of dredged or fill material

Exemptions

- Normal on-going farming, silviculture and ranching activities
- Maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures (NOTE: no changes to original fill design)
- The construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance (but not construction) of drainage ditches
- Construction or maintenance of farm roads, forest roads, or temporary roads for moving mining equipment

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Types of Permits

General Permits

- Nationwide Permits
- Regional General Permits

Individual Permits (IP)

- Letters of Permission
- Standard IP
  - Project-specific evaluation and authorization
  - Process involves public notice, public comment period, potential for hearings
  - Public Interest Review Factors
  - Alternatives Analysis/404(b)(1) Guidelines
  - Mitigation

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Nationwide Permits (NWP)

- Issued for a particular category of activities (e.g. NWP 12 for Utility Lines).

- Issued nationally for a five-year period
  -NEPA process conducted during reissuance
- ~50 activity-specific permits
- Corps issues verification of authorization letter that states proposed project meets terms and conditions of a NWP

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Commonly Used NWPs

- NWP 3 – Maintenance of Existing Structures
- NWP 12 – Utility Lines
- NWP 13 – Bank Stabilization
- NWP 14 – Linear Transportation Projects
- NWP 37 – Emergency Watershed Protection/Rehabilitation
- NWP [illegible]anagem Facili

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Emergency Regional General Permit (RGP) NM-12-01

Emergency situation = clear, sudden, unexpected, and imminent threat to life or property demanding immediate action to prevent or mitigate loss of, or damage to, life, health, property or essential public services.

- Intended to alleviate an immediate threat.
- Most projects initiated within 7 days.

Projects undertaken months after the emergency event can be authorized under a Nationwide Permit.

Emergency RGP (cont'd)

Examples of activities that may be covered:

- Levee rebuilding or maintenance.
- Removal of accumulated sediment, debris or vegetation to prevent or mitigate the emergency situation.
- Bank stabilization to prevent or minimize erosion or the loss of structures such as bridges.
- Debris containment structures.
- Construction of diversion channels and flow deflection structures.

Emergency RGP (cont'd)

What information is needed to approve an emergency project?

- Applicant contact information
- Location of the proposed activity
- Purpose of the project
- Type of waterbody affected (i.e. perennial, intermittent, or ephemeral stream; wetland; etc.)
- Estimates of area of impact - temporary and permanent
- Map of the project area
- Location for disposal of excavated material
- Mitigation may be required for permanent impacts

Once a project is reviewed, the permittee will be notified, in writing, that they can proceed with the activity.

Sediment Removal RGP NM/West TX-14-02

- Projects conducted by local, state, federal and tribal agencies for sediment and debris removal activities in watersheds damaged by wildfire and flooding in order to lower risks of future flooding.
- Activities are limited to 1,500 linear feet as measured along the bank unless a waiver is granted.
- The time frame to apply is two years following the precipitating event. Permitted activities must be completed within one year of project authorization unless an extension is granted.

Levee building is not an authorized activity.

Best management practices required to minimize environmental impacts.

Difference Between Emergency and Sediment Removal RGPs

Emergency RGP covers activities that must be implemented during, or immediately after an emergency, such as wildfires or flooding, and that cannot be planned for in advance. It allows the minimum work necessary to alleviate the immediate emergency.

Sediment Removal RGP is intended for projects that can be planned in advance, e.g. sediment removal activities planned in advance of annual monsoon rains to restore a stream to its pre-flood capacity. These activities are not an 'unexpected' emergency, but may be necessary to lower risks of future flood impacts.

Stream Stabilization & Water Quality Improvement Projects Within Urban Ephemeral Channels RGP

Authorizes stream stabilization and water quality improvement projects in ephemeral drainages located in urban environments.

Examples:

- Bank stabilization exceeding NWP13 thresholds and results in minimal impacts to the aquatic environment.
- Grade control structures, energy dissipaters, and flow deflection structures
- Water quality improvement features (e.g. debris containment or removal structures, sediment settling basins).
- Any combination of the above resulting in minimal impacts to the aquatic environment.

Water Quality Certification

Section 401 of the Clean Water Act - certification of compliance with state or tribal water quality standards by the state/tribal water quality certifying authority is required for any discharge of dredged/fill material into water of the United States under Section 404 of the Act (see **33 CFR 325.2** [Individual Permits] and **33 CFR 330.4(c)** [Nationwide Permits]).

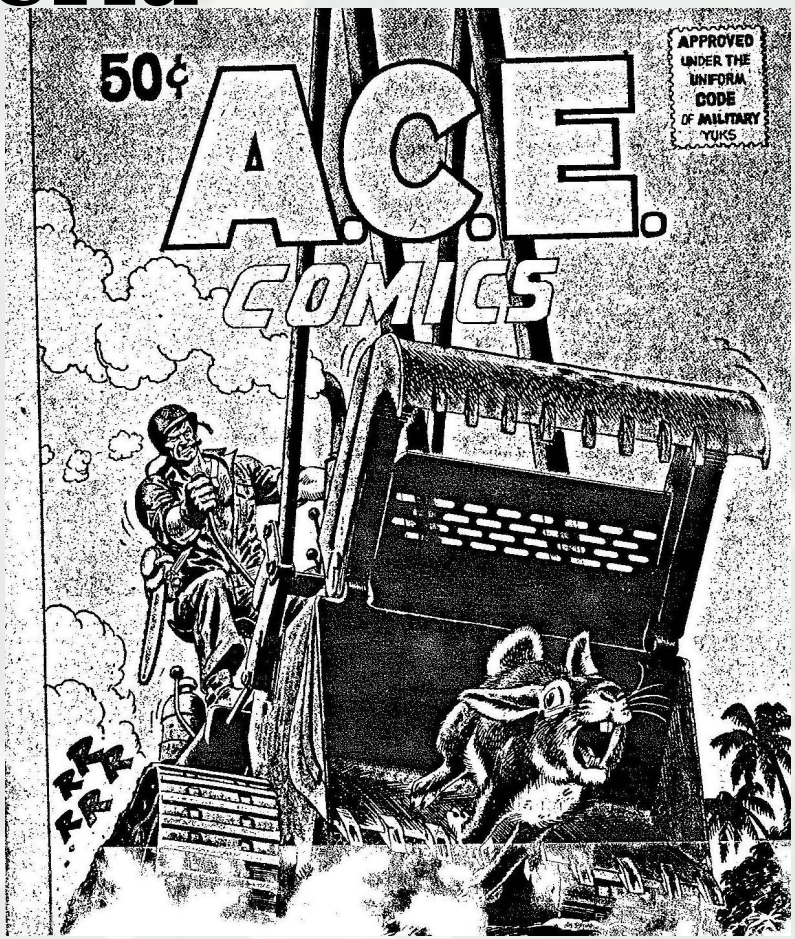
The Environmental Protection Agency (EPA) administers Section 401 Water Quality Certification (WQC) for tribes that do not have water quality certifying authority.

Individual Permits

- When an activity cannot be authorized by general permit an individual permit is required
- Evaluation process involves:
  - Pre-application Coordination/Consultation
  - Public Review (public notice)
  - Alternatives Analysis (CWA 404(b)(1) Guidelines)
  - Environmental Assessment
    - Aquatic resources
    - Endangered/Threatened Species (Endangered Species Act)
    - Cultural Resources (National Historic Preservation Act)
    - Other environmental factors (public interest review, Fish & Wildlife Coordination Act, Migratory Bird Treaty Act, etc)
  - Mitigation = Avoidance > Minimization > Compensation
  - Decision

404 Individual Permit Decision Criteria

- Project is NOT contrary to the Public Interest
- Project complies with the CWA 404(b)(1) Guidelines
- Project complies with the Mitigation Rule



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Public Interest Review

- The decision whether to issue a permit will be based on an evaluation of the probable impacts of the proposed activity and its intended use on the public interest.
- 20 Public Interest Review Factors
- Balance benefits against detriments to public
- Corps will issue permit unless “contrary to the public interest”

Public Interest Review Factors

- Conservation
- Economics
- Aesthetics
- General Environmental Concerns
- Wetlands
- Historic Properties
- Fish and Wildlife Values
- Flood Hazards
- Floodplain Values
- Land Use
- Navigation
- Shore Erosion and Accretion
- Recreation
- Water Supply and Conservation
- Water Quality
- Energy Needs
- Safety
- Food and Fiber Production
- Mineral Needs
- Property Ownership

Alternatives Analysis

- Basic Project Purpose - The fundamental, essential, or irreducible purpose of the proposed project. Used to determine whether the project is "water dependent".
  - "Water dependent" projects – proposed to occur within a special aquatic site and require access or proximity to, or siting within, a special aquatic site.
  - Special aquatic sites = sanctuaries and refuges, wetlands, mud flats, vegetated shallows, and stream riffle and pool complexes.
- If a project is not water dependent the regulations presume that:
  - practicable alternatives that do not involve special aquatic sites are available, and
  - these alternatives will have less adverse impact on the aquatic ecosystem.
- Examples of Basic Project Purpose: housing, commercial development, transportation, river maintenance

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Alternatives Analysis (cont.)

- Overall project purpose - The project purpose of the applicant's specific project. The 404 alternatives analysis is based on the overall project purpose.

- "The overall project purpose should be specific enough to define the applicant's needs, but not so restrictive as to constrain the range of alternatives that must be considered under the 404(b)(1) Guidelines."
    - Used as the basis for the alternatives analysis
    - Expands basic purpose to applicant's specific project
    - Determined from the typical applicant's perspective.
    - Defines the geographic boundaries of the search for alternatives
    - Defines the extent of effects you are required to consider (permit area)

Examples of overall project purpose: To construct an upscale commercial development to serve southern Santa Fe County.

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CWA 404(b)(1) Guidelines

- Focus of the 404(b)(1)analysis is the impact to aquatic resources/special aquatic sites:

  - No discharge shall be permitted if there is a practicable alternative that would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences (40 CFR 230.10)

  - LEDPA = Least Environmentally Damaging Practicable Alternative

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LEDPA

Practicable Alternative = an alternative that is or was available and capable of being done after taking into consideration cost, existing technology, and logistics in light of the overall project purpose.

Of all alternatives that are practicable, we must select the alternative that is the least environmentally damaging

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Practicable vs. Practical

- Regulations use the word “practicable”.
- Practicable = feasible
- Practical = usable

NEPA & 404(b)(1) Guidelines

<u>The goals for NEPA alternatives analysis and CWA Section 404(b)(1) Guidelines are different:</u>

- The goal of NEPA is to support the agency's preferred alternative
- The goal of the 404(b)(1) guidelines is to identify the LEDPA

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Water Quality Certification for Standard IPs

For all activities that require a Sec. 404 Standard IP, applicants must apply for individual WQC from the appropriate certifying authority.

Other Environmental Considerations

The Corps federal action (i.e. permits) requires compliance with various environmental laws, including:

- National Environmental Policy Act (NEPA)
- National Historic Preservation Act (NHPA)
- Endangered Species Act (ESA)

NEPA

NEPA requires federal agencies to integrate environmental values into their decision making processes by considering the environmental impacts of their proposed actions and reasonable alternatives to those actions.

- NWPs
  - EA level analysis conducted and documented during reissuance, every 5 years
- IPs/RGPs
  - Decision Document - *Includes Alternatives Analysis and Public Interest Review Factors*

NHPA

Section 106 of the NHPA requires Federal agencies to take into account the effects of their undertakings on historic properties.

- If the agency's undertaking could affect historic properties, the agency determines the scope of appropriate identification efforts and then proceeds to identify historic properties in the area of potential effects.
- The agency reviews background information, consults with the SHPO/THPO and others, seeks information from knowledgeable parties, and conducts additional studies as necessary.
- An undertaking has an “effect” on a historic property when the scope of work may alter the characteristics of the property that qualify it for National Register eligibility.
- Adverse effects include, but are not limited to: 1) Physical destruction or damage; 2) Alteration of a property that is not consistent with Secretary’s Standards (restoration, maintenance); 3) Removal of property from its historic location; 4) Change of the character of the property’s use or physical features within the property’s setting; (5) introduction of elements (i.e. visual, audible) that are out of character with the property

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Appendix C of 33 CFR Part 325

Because of the unique nature of the Regulatory Program, the Corps promulgated its own regulations to comply with Section 106 of the NHPA. The Corps followed the required rulemaking processes and received Office of Management and Budget approval, finalizing the regulations in 1990.

The term *“undertaking*'' as used in this appendix means the work, structure or discharge that requires a Department of the Army permit pursuant to the Corps regulations at 320-334.

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ESA

Corps must document evaluation process and decision regarding ESA issues

- What was the basis for the effects determination?
- Was a Biological Assessment or Evaluation prepared?
- Concurrence Letter received?
- Biological Opinion received?
- List any discretionary conservation recommendations that may be included in the biological opinion.
- Jeopardy Opinion?

Why is Early Interagency Coordination Important?

- Identification of all agencies/stakeholders involved in the project.
- Where multiple federal agencies are involved, to identify the lead agency.
- Ensuring compliance with NEPA, NHPA, ESA, and Clean Water Act requires early and ongoing coordination.

We can prevent delays that result from inadequate interagency coordination!

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404(b)(1) Guidelines

Discharge is PROHIBITED when:

- Violates Water Quality Standards or toxic effluent standards
- Violates any requirement imposed by the Secretary of Commerce to protect any marine sanctuary designated under the Marine Protection, Research, and Sanctuaries Act of1972.
- Jeopardizes the continued existence of threatened and endangered species
- Results in Significant Degradation of Waters

Mitigation Rule (33 CFR 332)

- Must avoid and minimize adverse impacts to the aquatic ecosystem to the maximum extent practicable.
- Must compensate for remaining impacts that result in loss of aquatic ecosystem function and

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Mitigation Rule

- Compensatory Mitigation Types
  - Restoration
  - Enhancement
  - Establishment (i.e., creation)
  - Preservation
- Compensatory Mitigation Preference Hierarchy
  - Mitigation Bank (not currently available to public in SPA)
  - In-Lieu-Fee (not currently available in SPA)
  - Permittee-responsible mitigation (also hierarchal)
    - ✓ watershed approach
    - ✓ on-site and in-kind
    - ✓ off-site and/or out-of-kind

Mitigation

- Mitigation and Monitoring Guidelines
  - Detailed document to guide applicant/consultant through mitigation plan preparation and monitoring
- USACE South Pacific Division SOPs
  - Mitigation Ratio Setting Checklist
    - How we establish mitigation ratios for impacts to aquatic resources
    - Looks at loss of function either qualitatively or quantitatively
    - Evaluates temporal loss, risk, uncertainty and aquatic resource type conversion

Mitigation

USACE South Pacific Division SOPs

-Performance Standards

- Physical, hydrologic, biologic standards to measure mitigation performance and ultimate success
- Need both interim and final performance standards to establish success trajectory and evaluate need for adaptive management

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Important Points

- Section 404 of the Clean Water Act requires Corps review and approval of most dredge or fill activities in Waters of the U.S.
- Contact the Corps before discharging dredged or fill material to a wetland, stream or arroyo.
- A NEPA analysis conducted under another federal agency's implementing regulations may not meet 404(b)(1) requirements; that agency's preferred alternative may not be equivalent to the Corps' LEDPA.
- Early interagency coordination expedites project approval.

Questions ?